IS IT SAFE TO ASSUME?

A White Paper on State Assumption of Clean Water Act Section 404 Authority

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In the summer of 2015, the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") finalized a rule intended to clarify the jurisdictional reach of the Clean Water Act ("CWA" or "Act").[1] The rule responded to decades of confusion about how to identify those "waters" the Act protects. While diverse interests agreed on the need for clarity,[2] the final product unleashed a torrent of opposition from many states (including Colorado) and regulated entities who saw it as an affront to state rights and responsibilities under the CWA.[3]

About this same time, EPA led another effort with major implications for the role of states in CWA implementation. Unlike the jurisdictional rule,[4] this effort went largely unnoticed. In June 2015, responding to a request from groups representing state interests,[5] EPA formed a stakeholder group, the Assumable Waters Subcommittee (AWS or "Subcommittee"), to recommend ways to identify those waters a state can regulate when it seeks dredged and fill permitting authority[6] under CWA Section 404(g)(1).[7]

This paper provides background on CWA Section 404(g)(1), briefly reviews the Subcommittee's recommendations, and offers some context for what these recommendations could mean in Colorado. In doing so, the paper seeks to draw attention to an issue needing discussion, particularly in light of the unique implications for Colorado of the AWS's work, the State's future water supply challenges, and renewed political focus on ensuring that regulatory regimes show "due regard for the roles of the Congress and the States under the Constitution."[8]

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[1] *See* 79 *Fed. Reg.* 22188 (April 21, 2014); 80 *Fed. Reg.* 37054 (June 29, 2015).

[2] 80 *Fed. Reg.* at 37056; 82 *Fed. Reg.* 12532 (March 6, 2017).

[3] Former Speaker of the House John Boehner summed up how many opponents viewed the final rule:

> The administration's decree to unilaterally expand federal authority is a raw and tyrannical power grab that will crush jobs. … [T]he rule is being shoved down the throats of hardworking people with no input, and places landowners, small businesses, farmers, and manufacturers on the road to a regulatory and economic hell.

https://www.speaker.gov/press-release/boehner-statement-wotus-ruling.

[4] The "jurisdictional rule" referenced here is also frequently referred to as the "Waters of the United States Rule," the "WOTUS Rule," or the "Clean Water Rule."

[5] April 30, 2014 letter from the Environmental Council of the States ("ECOS"), the Association of Clean Water Administrators ("ACWA"), and the Association of State Wetland Managers ("ASWM") to Nancy K. Stoner Acting Assistant Administrator for Water, EPA, available at: https://www.ecos.org/wp-content/uploads/2016/03/Letter-to-EPA-RE-Assumable-Waters-Final-April-30-2014.pdf.

[6] 80 *Fed. Reg.* 13539 (March 16, 2015).

[7] 33 U.S.C. §404(g)(1). The process by which a state obtains approval from EPA to administer the Section 404 permitting program within its borders is known as "assumption."

[8] Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, February 28, 2017, 82 *Fed. Reg.* 12497 (March 3, 2017) (instructing EPA and the Corps on relevant considerations for a revised jurisdictional rule). *See also*, *FY 2018-2022 EPA Strategic Plan*, February

BACKGROUND

Congress passed the "modern-day" CWA in 1972[9] to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] The Act stated ambitious goals, including the complete elimination of the discharge of pollutants by 1985.[11]

The CWA's cornerstone provision is the "Discharge Prohibition," which prohibits the discharge of a pollutant by any person except in compliance with a permit.[12] The Act contains two permitting programs to authorize pollutant discharges.

CWA Section 402[13] contains one such program. This section regulates wastewater discharges through the National Pollutant Discharge Elimination System ("NPDES"). NPDES permits typically authorize a permittee to discharge pollutants from specific outfalls under numerical limitations and other conditions.

The 1972 Act gave EPA initial NPDES program authority. However, Congress also acknowledged "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"[14] within their borders, and authorized states to petition EPA to administer their own programs in lieu of the federal program.[15] Once EPA grants Section 402 primacy to a state, that state assumes responsibility for issuing discharge permits, though EPA retains oversight.[16]

This cooperative federalism approach, common in the major federal environmental statutes, proved popular, and states quickly established their own NPDES programs. Today, 47 states (including Colorado) exercise NPDES authority.[17]

12, 2018, (Goal 2 – Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people).

[9] Federal efforts to control water pollution date back to legislation passed in the late 1800s authorizing the Corps to control the dumping of materials that may impede navigation. *See e.g.*, 33 U.S.C. §407 (part of the Rivers and Harbors Act of 1899). Congress also passed the Water Pollution Control Act of 1948 (Public Law 80-845, 62 Stat. 1105 (1948)), which largely supported state and local water pollution control efforts. Congress amended this legislation in 1956, 1961, and 1965. The reference to the "modern-day" Act here reflects the complete restructuring of the statutory framework by additional amendments in 1972.

[10] 33 U.S.C. §1251(a).

[11] *Id.*

[12] 33 U.S.C. §1301(a).

[13] 33 U.S.C. §1342.

[14] 33 U.S.C. §1251(b).

[15] 33 U.S.C. §1342(b).

[16] 33 U.S.C. §1342(d).

[17] In June 2018, Idaho became the 47th state to obtain NPDES authority. 83 *Fed. Reg.* 27769 (June 14, 2018).

Section 404[18] contains the other CWA permitting program. It regulates discharges of dredged or fill material. This permitting program, often referred to as "wetland permitting,"[19] is primarily administered by the Corps with EPA oversight.

Recognizing the success of state Section 402 program assumption, Congress added a provision in the 1977 CWA Amendments allowing states to obtain approval from EPA to administer their own Section 404 programs.[20] Though similar in concept and procedure to state assumption of NPDES authority under Section 402(b), only two states – Michigan (in 1984) and New Jersey (in 1994) – have assumed Section 404 permitting authority.

This sizable discrepancy in state assumption of the two CWA permitting programs is somewhat puzzling. Congress clearly intended states to implement both – it stated so explicitly in the Act.[21] Moreover, as noted above, many states (including Colorado) and regulated entities objected vehemently to federal overreach in the context of the 2015 jurisdictional rule. Section 404(g) provides an avenue for state empowerment.[22]

Closer evaluation reveals certain impediments to Section 404 program assumption. These include the lack of guidance on the assumption process; costs and lack of federal funding for state program implementation; the inability to assume only part of the Section 404 program (as allowed under the Section 402 program); the potential for regulatory takings; and the need for strong public and political support.[23]

One of the biggest obstacles, however, is the difficulty in identifying those waters a state can regulate when it assumes Section 404 program authority. Among other things, this prevents a state from effectively assessing the potential benefits of program assumption before initiating the process. EPA formed the Assumable Waters Subcommittee to address this issue.

THE ISSUE

Congress did not authorize states to assume CWA Section 404 authority over *all* waters located within their borders. The Corps must retain authority over certain non-assumable waters. Congress described these non-assumable waters (*i.e.*, "retained waters") in a parenthetical in Section 404(g):

> (… those ***waters*** which are presently used, or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce

[18] 33 U.S.C. §1344.

[19] Notwithstanding this common reference, CWA Section 404 regulates discharges to all jurisdictional waters, not just wetlands.

[20] 33 U.S.C. §1344(g).

[21] "It is the policy of Congress that the States … implement the permit programs under sections [402] and [404] of this title." 33 U.S.C. §1251(b).

[22] In fact, this lack of Section 404 permitting assumption meant that the 2015 jurisdictional rule would have had its primary impact in the Section 404 context, a point often lost in the associated contentious debate.

[23] *See e.g.*, *Issues to Consider for State Administration of Section 404 Clean Water Act Permits*, Montana Legislative Services Division (2014), Appendix C; Aileen A. Carlos, *The Trouble with Assumptions: An Analysis of the Ongoing Struggles with §404 Assumption*, Master's Thesis, September 2014. p. 11.

> shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including ***wetlands adjacent*** thereto) … .

(Emphasis added.)

Applying this parenthetical to distinguish retained waters from assumable waters has proven challenging. Decades of case law and administrative decision making related to navigability interpretations, Corps implementation of Section 10 of the Rivers and Harbors Act of 1899 ("RHA"),[24] and efforts to define the jurisdictional reach of the CWA have all clouded the legal terminology underlying the evaluation.[25]

One precondition of state program approval requires a state to enter a memorandum of agreement ("MOA") with the Corps that, among other things, describes the waters the Corps will continue to regulate following assumption.[26] The Agencies have not issued guidance on how to identify these waters, so the process has generally boiled down to a negotiation between the relevant Corps district and the state.[27] Significantly, the Corps has final say on which waters it will retain.[28] This provides considerable negotiating leverage.

How the Corps applies the retention provision can significantly affect which waters are available for state assumption, which in turn influences a state's evaluation of the costs and benefits of assumption. For example, Minnesota recently studied the feasibility of Section 404 program assumption under the Corps' traditional approach to retention.

Minnesota's analysis of retained and assumable waters indicated that the Corps would retain authority over 91.5% of total wetland acreage and 98.7% of total lake acreage in the State. This and other findings led Minnesota to view assumption unfavorably.[29] Minnesota's experience also highlights the importance of the Subcommittee's task.

SUBCOMMITTEE MAKEUP, TASK, AND RECOMMENDATIONS

The AWS consisted of 22 representatives of federal, state, and tribal governments, as well as environmental and regulated interests. The group included representatives from EPA, the Corps, and the United States Fish and Wildlife Service ("USFWS"). The EPA and USFWS representatives, while participating in the discussions, did not make recommendations (*i.e.*, they were not "recommending members" of the Subcommittee).[30]

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[24] 33 U.S.C. §403.

[25] *See* Peg Bostwick, *Salameander: Navigable, Adjacent, Assumable Waters? We need to distinguish between assumable and jurisdictional waters of the United States*, posted October 31, 2013. Available at: https://www.aswm.org/wordpress/salameander-navigable-adjacent-assumable-waters/.

[26] 40 CFR §233.14.

[27] *Final Report of the Assumable Waters Subcommittee*, May 2017 ("*Final Report*") p. 3.

[28] 40 CFR §233.14(b)(1).

[29] Analysis of Retained and Assumable Waters in Minnesota, May 3, 2018, p. 3-4. The analysis showed that Minnesota would gain authority over 88% of its total stream miles – mostly streams of the first or second order. *See id.* at 4.

[30] *Final Report* at iv and Appendix D.

The Subcommittee worked from October 2015 through April 2017 to interpret the retained waters parenthetical and develop recommendations for EPA. The AWS chose the terms "waters" and "adjacent wetlands," unencumbered by their legal significance under the CWA, to explain its analysis and provide its recommendations for identifying retained and assumable waters.[31] This paper uses the same terms accordingly.

The Subcommittee divided its task into three primary topics:

(1) The origins, legislative history, and processes of Section 404 assumption;
(2) The extent of "waters" over which the Corps must retain authority; and
(3) The extent of "adjacent wetlands" over which the Corps must retain authority.[32]

To help accomplish its task, the AWS assigned issues to four work groups – Tribal Considerations, Origin and Purpose of Section 404(g), Waters, and Adjacent Wetlands.[33] The work of the latter three groups is briefly described below.[34]

As an initial matter, it is critical to distinguish the Subcommittee's charge to advise on how to assign administrative authority over jurisdictional waters in a state that has assumed Section 404 authority, from the broader issue of what waters are jurisdictional under the CWA. All CWA jurisdictional waters will be regulated under Section 404, no matter which entity administers the program.[35] Moreover, Section 404(g)(1) and its implementing regulations are designed to ensure that an approved state program protects the resource at least as well as its federal counterpart. (Whether one agrees that this will occur in each state that might assume the program is a different matter.)

ORIGIN AND PURPOSE WORK GROUP

The Origin and Purpose Work Group sought to decipher the language of the retained waters parenthetical primarily by reviewing the legislative history of the 1977 CWA Amendments ("Legislative History"). In doing so, this work group reached the following key conclusions:

- The Legislative History shows that Congress expected states to assume Section 404 permitting authority.[36]
- The Legislative History shows that Congress intended the Corps to retain jurisdiction over those waters it traditionally regulated under RHA Section 10, except those deemed

[31] *Id.* at 7.
[32] *Final Report* at iv.
[33] *Final Report* at 7.
[34] For ease of reference, this paper discusses Section 404(g) in the context of state assumption. However, under CWA Section 518 (33 U.S.C. §1377(e)), added by Congress in the 1987 CWA amendments, EPA may treat eligible Indian tribes as states under various CWA provisions, including Section 404. 80 *Fed. Reg.* 30183, 30185 (May 16, 2016). Tribal pursuit of Section 404 program assumption would generally follow the same process as states. States assuming Section 404 permitting authority cannot assert such authority over waters on tribal lands. *Final Report* at 3. Appendix A of the *Final Report* contains Tribal Findings, Issues, and Considerations during Assumption.
[35] *Final Report* at 7.
[36] *Id.* at 60 (citing S. Rep. No. 95-370, at 77-78 (1977).

navigable based solely on historical use.[37] (Section 404(g) omits any reference to historical navigability.)

- The Legislative History provides no definitive meaning for the term "adjacent" in Section 404(g)(1) as it applies to wetlands.[38]

These conclusions informed the analysis and recommendations of the other Subcommittee work groups.

SUBCOMMITTEE'S "WATERS" RECOMMENDATION

After analyzing three alternative approaches developed by the Waters Work Group, the Subcommittee recommended that when a state assumes the Section 404 program, the Corps should retain authority over waters it regulates under RHA Section 10, with slight modifications. The Corps maintains a list of these waters for every state except Hawaii.[39]

Under this approach, the Corps would identify retained waters by taking its list of RHA Section 10 waters for a state, adding unlisted waters that qualify for the Section 10 list, adding tribal waters (which a state cannot assume),[40] and subtracting any waters included on the Section 10 list based solely on historical use (*e.g.*, use by fur traders). The Corps would have sole responsibility to maintain the list, including adding to it to account for subsequent developments, such as a change in the physical condition of a waterbody or RHA case law.[41]

The Subcommittee thought that the relative simplicity of this approach would encourage state assumption by allowing states to more readily assess its costs and benefits.[42] Moreover, the broader scope of assumable waters under this approach (compared to other alternatives) would give states greater payback for the time and expense of pursuing assumption.[43]

SUBCOMMITTEE'S "ADJACENT WETLANDS" RECOMMENDATION

After analyzing three alternative approaches developed by the Adjacency Work Group, the Subcommittee recommended setting a bright line distance from retained waters to establish the area within which the Corps would retain authority over adjacent wetlands. It favored a variation of this approach that assumes a 300-foot national administrative boundary, which could shift (shrink or expand) to accommodate state-specific situations, such as existing government programs, or the topography or hydrology of a given area.[44]

The boundary would be established prior to assumption during negotiation of the required state/Corps MOA. If a state and the Corps cannot agree on a state-specific administrative

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[37] *Id.* at 60.
[38] *Id.* at 12.
[39] *Id*.
[40] *See supra* note 34.
[41] *Id.* at 14-15.
[42] *Id*. at 20.
[43] *Id.* at 21.
[44] *Id.* at 27, 30, and 33.

boundary, the boundary width defaults to 300 feet. The Corps would retain authority over all adjacent wetlands, or portions thereof, lying between the administrative boundary and a retained water, regardless of whether they physically touch the water.[45]

This approach would greatly limit the need for case-specific field verification and would give states clarity on adjacent wetlands prior to Section 404 program assumption. It would also separate the adjacency determination from CWA jurisdictional considerations.[46] The Subcommittee believed that this approach sets a clear and implementable boundary that can accommodate unique state circumstances while preserving Corps authority to protect federal navigation interests, as required by the RHA.[47]

MINORITY RECOMMENDATIONS

Interestingly, the Subcommittee's position was not unanimous – it issued majority and minority recommendations. The Corps representative was the sole proponent of the minority recommendations, which largely reflect the traditional approach to identifying retained waters (with the addition of guidance and regulations to better define the process).[48]

In a nutshell, the Corps' waters recommendation would have added "Traditional Navigable Waters" ("TNWs"), as described in 33 CFR §328.3(a)(1), to the list of waters the majority approach would retain.[49] The 33 CFR §328.3(a)(1) concept of TNWs (part of the Corps' definition of "waters of the United States") captures significantly more waters than those regulated under RHA Section 10.[50]

The Corps' adjacent wetlands recommendation would have applied the concept of adjacency it currently uses for CWA jurisdictional determinations, with no administrative limit (*i.e.*, boundary).[51] This approach would capture far more wetlands than the majority approach. In some states, wetland complexes that would be considered "adjacent" in the jurisdictional sense can extend more than 100 miles from a retained water.[52]

Unfortunately, this approach has long deterred states from pursuing Section 404 program assumption, in part because it provides insufficient payback (*i.e.*, fewer assumed waters) to justify the considerable fixed costs of creating and implementing a Section 404 program. The Corps' traditional approach also frequently implicates site-specific determinations of whether to retain a given water. This increases the time and transactional costs of the Corps/state MOA negotiations,

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[45] *Id.* at 27-28.

[46] *Id.* at 27-28.

[47] *Id.* at 29-34.

[48] *See* January 25, 2017 letter from Chad Konickson, Chief, Regulatory Branch to Doug Norris, Minnesota Department of Natural Resources (explaining the Corps' basis for identifying retained waters in Minnesota), at Analysis of Retained and Assumable Waters in Minnesota, May 3, 2018, Appendix B. The development of regulations and guidance to support this approach would likely provide more national consistency than the traditional free-form negotiations.

[49] *Id.* at 20.

[50] *See Id.* at 20-21.

[51] *Id.* at 24 and 34.

[52] *Id.* at 31.

and prevents effective pre-assumption assessment of potential program costs and benefits. In short, the Corps' recommendations are hard to square with clear Congressional intent, and are at odds with a primary impetus for forming the Subcommittee (*i.e.*, to provide clarity).[53]

In contrast, the majority's recommendations would essentially eliminate the assumable/retained waters quandary. This could decidedly change the cost/benefit equation for some states.

WHERE THINGS STAND

The Subcommittee submitted its final report to EPA on June 2, 2017. EPA intends to issue a Notice of Proposed Rulemaking in September 2019, and a Final Rule in September 2020,[54] to update the 1988 regulations governing state assumption.[55] This rulemaking will implement EPA's response to the Subcommittee's report. It seems a safe bet that the current administration will issue regulations consistent with the majority's recommendations.

Perhaps more significantly, the Corps later retreated from its Subcommittee minority recommendations. In a memorandum dated July 30, 2018, the Corps, referring to its Subcommittee member as a "technical representative," stated that it will implement the AWS's majority recommendations effective immediately, subject to further proceedings by EPA and the Corps.[56] Thus, the rules governing state assumption have already effectively changed.

IMPLICATIONS FOR COLORADO

While no state has joined New Jersey and Michigan in assuming Section 404 authority, at least 24 have evaluated assumption to some degree.[57] Some, like Minnesota, have done so multiple times.[58] According to the Association of State Wetland Managers' website, the Colorado Department of Natural Resources evaluated state assumption in the early 1990s and determined that the costs outweighed the benefits.[59] Given the Subcommittee's recommendations, the Corps' decision to implement those recommendations, and EPA's upcoming rulemaking, it makes sense for Colorado to reassess.

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[53] Interestingly, though not speaking on behalf of the Corps, Lance Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs for the Corps, has cast negative light on state Section 404 program assumption. *See e.g.*, Lance D. Wood, *THE ECOS PROPOSAL FOR EXPANDED STATE ASSUMPTION OF THE CWA 404 PROGRAM: UNNECESSARY, UNWISE, AND UNWORKABLE*, 39 Envtl. L. Rep. News & Analysis 10209, 10210 (March 2009) ("ECOS PROPOSAL") ("in my opinion, expanded state assumption of the CWA §404 program would generally be counter-productive to the goal of protecting aquatic resources").

[54] Office of Management and Budget's 2018 Spring Regulatory Agenda, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2040-AF83.

[55] 40 CFR Part 233.

[56] July 30, 2018 Memorandum for Commanding General, U.S. Army Corps of Engineers, from R. D. James, Assistant Secretary of the Army (Civil Works), available at: https://www.army.mil/e2/c/downloads/525981.pdf.

[57] ASWM, *Status and Trends Report on State Wetland Programs in the United States*, (2015) p. 29.

[58] *Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study*, January 17, 2017, p. iv ("*Minnesota Feasibility Study*").

[59] https://www.aswm.org/state-summaries/755-colorado.

The most compelling reason for Colorado to reevaluate assumption would be the sheer amount of CWA jurisdictional waters that the State could regulate under the new approach. While the practical difference of applying the new and traditional approaches to identifying retained waters would vary from state-to-state, the difference in Colorado is striking.

The Corps' traditional approach of retaining TNWs, in addition to RHA Section 10 waters, would capture large stretches of numerous Colorado rivers, such as the Taylor, Gunnison, South Platte, Cache la Poudre, Yampa, Arkansas, and upper Colorado, and even streams like St. Vrain Creek. The traditional approach would also add wetlands adjacent to these waters by applying the jurisdictional concept of adjacency, which could capture wetlands extending great distances from these waters. Under this approach, the Corps would retain authority over a tremendous portion of waters in the State and diminish the payback of Section 404 program assumption.

The Colorado equation changes markedly under the Subcommittee's recommendations. Due to their relatively smaller sizes and flows, Colorado's rivers, though numerous, are not widely used to transport interstate or foreign commerce. Accordingly, the only RHA Section 10 waters currently listed in Colorado are 39 miles of the Colorado River from Grand Junction downstream to the State line, and the Colorado portion of Navajo Reservoir. Moreover, the Corps would only retain wetlands, or portions thereof, lying between the administrative boundary and the retained water (a presumed distance of 300 feet). Thus, under the majority approach, state assumption would *virtually eliminate* Corps permitting in Colorado.[60]

As an initial matter, this could help ensure consistent administration of the Section 404 permitting process in all regions of Colorado. Currently, three separate Corps Districts cover Colorado, which can create inconsistencies across the State in the permitting process and associated program administration.

Additionally, proponents often identify increased program efficiency, and resulting time and cost savings for permit applicants, as a primary benefit of state assumption. This would be more obvious, however, in states that already have an extensive wetland regulatory program that effectively creates a double layer of regulation.[61]

Colorado does not have its own wetland program that overlaps with the Corps'. Instead, Colorado's main participation in CWA Section 404 permitting comes through its certification of Corps-issued permits under CWA Section 401.[62] Section 401 empowers a state to ensure that federally-issued permits comply with state water quality requirements through a certification process that allows the state to approve a federal permit with conditions, or even reject it outright.

Nonetheless, when a state assumes authority under CWA Section 404(g), it administers its own program in lieu of the Corps program for all assumed waters. This includes permit issuance

[60] In addition to the identified Section 10 waters and wetlands adjacent thereto, the Corps would also retain Section 404 permitting authority on the Southern Ute Indian Tribe Reservation in Southwest Colorado.

[61] *See* Association of State Wetland Managers, Inc. and The Environmental Council of the States, *Section 404 Program Assumption, A Handbook for States and Tribes*, August 2011, ("*Assumption Handbook*") p. 2; *Minnesota Feasibility Study*, p. 2.

[62] U.S.C. §1341.

and program enforcement.[63] The state would also issue jurisdictional determinations, process permitting exemptions, and implement mitigation (including mitigation banks and in-lieu fee programs). So, while state assumption would not eliminate a duplicative permitting process in Colorado, these program elements do provide an opportunity for certain process efficiencies.

Chief among them would be the potential to more efficiently address the complexities that Colorado's water rights administration system often injects into Section 404 matters. These issues can be particularly challenging, for example, in the context of assessing the impacts of proposed water infrastructure projects, which typically trigger Section 404, and which are contemplated by the State's water plan.[64] Large storage projects often utilize multiple water sources. Predicting the impacts of such projects typically requires a deep understanding of the underlying water rights, project operations, how and when available water rights will be used in the project, and how the project will interact with other water management efforts in the basin.

Water rights issues can also complicate compensatory mitigation efforts, both with respect to permittee-responsible mitigation, and in the creation of mitigation banks or in-lieu fee programs.[65] Creating compensatory wetlands in any of these contexts can deplete flows in nearby streams and trigger the need for dedicated water rights.

To be sure, state assumption would not remove water rights issues from the Section 404 program, but it would allow the Colorado State Engineer to work directly with a sister State agency to help resolve them. While the Corps, often with the assistance of third-party consultants or project proponents, can work its way through these issues, coordination between expert State agencies, at least in theory, could provide a more efficient avenue.

State assumption would also eliminate certain aspects of the Section 404 permitting process that often consume considerable time and resources, though this would not guarantee increased efficiency. For instance, Section 404 permits would no longer require Section 401 certification since that process applies only to federally-issued permits. The state, however, would still require some mechanism to ensure that permitted activities meet water quality standards. Any advantage would hinge on the efficiency of that mechanism compared to the current Section 401 process.

Similarly, only federal actions trigger review under the National Environmental Policy Act ("NEPA").[66] Thus, NEPA would not capture Section 404 permits issued by authorized states.

However, for EPA to approve a state's Section 404(g) application, the state must demonstrate that its program would be consistent with, and no less stringent than, the CWA and its implementing regulations. Applicable regulations include the so-called Section 404(b)(1)

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[63] *See FORTY YEARS AFTER THE CLEAN WATER ACT: IS IT TIME FOR THE STATES TO IMPLEMENT SECTION 404 PERMITTING?*, Hearing before Subcommittee on Water Resources and Environment, U.S. House of Representatives, 112th Cong. 2d Sess. September 20, 2012 ("*Subcommittee Hearing*"), p. 5; *Assumption Handbook* at 5.

[64] *Colorado's Water Plan*, 2015, Section 6.5.3.

[65] Corps regulations establish three compensatory mitigation mechanisms – mitigation provided by the permittee, or the acquisition of credits from wetland banks or in-lieu fee programs. 73 *Fed. Reg.* 19594 (April 10, 2008).

[66] *See* 42 U.S.C. §4332(C).

Guidelines,[67] which require, among other things, a detailed alternatives analysis and effects review that is more stringent than that required by NEPA.

Likewise, some note that state assumption would eliminate consultation under Section 7 of the Endangered Species Act ("ESA").[68] While it is true that state-issued permits do not trigger ESA Section 7 consultation,[69] state assumption would not eliminate threatened and endangered species considerations.

When a state assumes Section 404 authority, EPA retains oversight, and can review and comment on any permit the state issues. While EPA can waive review of some permit categories, it cannot waive review of, among others, those with a reasonable potential to affect threatened or endangered species.[70] EPA can object to the issuance of such permits unless the state addresses EPA's concerns. The state cannot issue a permit over EPA's objection.[71] Notably, in New Jersey, one of two states currently authorized to issue Section 404 permits, the review process for permits that may impact federally listed species looks very similar to ESA Section 7 consultation.[72]

Ultimately, the capacity of any state program to produce permitting efficiencies would relate directly to the amount of resources the state dedicates to the task. A state contemplating CWA Section 404 permitting assumption should be prepared to commit substantial resources to the program.

Of course, one group's efficiency may be another group's deficiency. Some environmental interests may view "efficiency" as a euphemism for "less protection." Many remain understandably wary of state assumption. Congress passed the "modern day" CWA for a reason. The state-centric approach to water pollution control that prevailed prior to 1972 failed at a most basic level. It did not even manage to keep some rivers from catching fire – a modest goal by any measure.[73] Concern that state-assumed programs are more susceptible to local political influence stokes fears of a return to the "bad old days."

These fears seem largely unfounded, however, due to the requirement that EPA maintain state program oversight. Moreover, it is state-administered Section 402 programs that have delivered much of the substantial water quality improvements achieved since the Act's passage.

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[67] 40 CFR Part 230.

[68] *See e.g.*, ECOS PROPOSAL, *supra* note 54 at 10212-10213.

[69] *See* Letter from Peter S. Silva, EPA Assistant Administrator to R. Stephen Brown, ECOS, and Jeanne Christie, ASWM, December 27, 2010, contained in *Subcommittee Hearing* at 160.

[70] 40 CFR §233.51.

[71] 40 CFR §233.50. For a more detailed evaluation of this issue, see John A. Kolanz, *National Association of Homebuilders v. Defenders of Wildlife: Implications Beyond Clean Water Act Section 402*, 45 Rocky Mt. Min. L. Fdn. J. 37 (2008).

[72] *Id.* at 47-48. *See also Memorandum of Agreement among the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and New Jersey Department of Environmental Protection and Energy Related to the Protection of Federally-Listed Threatened or Endangered Species and Designated Critical Habitat under a New Jersey-Assumed Section 404 Program*, December 22, 1993 (updated March 2018).

[73] The Cuyahoga River in Cleveland, Ohio is most closely associated with this inglorious distinction, but it is not the only river to have caught fire. Others include the Buffalo River in Buffalo, New York; the Schuylkill River in Philadelphia, Pennsylvania; and the Rogue River in Detroit, Michigan.

As these and other state-run environmental programs have matured, states have developed significantly more capacity to implement a sophisticated regulatory program than they had 50 years ago. And in Colorado, where outdoor recreation and tourism are multi-billion-dollar industries,[74] one would expect the State to maintain robust protection of its resources.

In fact, state assumption could provide Colorado a means to address unique resources that may currently lack CWA protection. For example, irrigation practices and infrastructure have created numerous wetlands throughout the State. These areas can be fairly extensive and provide wildlife habitat and water quality benefits. Many of these areas, however, may be excluded from CWA protection under current agency practices.[75] A Colorado Section 404 program could establish incentives for landowners to protect such areas.

Finally, most expect the upcoming revised CWA jurisdictional rule to decrease the Act's overall coverage. This could leave at least some valuable aquatic resources vulnerable. An effective state 404 program could help protect these resources.

CONCLUSION

Colorado may be the "Mother of Rivers,"[76] but most of these rivers are no more than adolescents when they leave the State. This geographical quirk places Colorado in an almost unique position among other states in the context of CWA Section 404 program assumption. With Colorado facing rapid population growth and a pressing need to secure additional water supplies, state assumption could provide Colorado greater control over its future.

This is not to suggest that state assumption in Colorado would be a panacea or an easy sell. Section 404 program assumption would require a substantial commitment of time and resources. Many in the environmental community might oppose it out of fear it would lessen existing protections, while many in the regulated community may be suspicious of any change in the *status quo*. Obtaining sufficient public buy-in could be challenging.

Nevertheless, it is easy to dismiss assumption as too risky or expensive without a detailed reassessment of costs and benefits that considers the new approach and the issues the State faces today.[77] The State and other stakeholders should understand the implications of the Subcommittee's recommendations and be prepared to comment on EPA's upcoming rulemaking in a way that preserves options and enhances potential returns should the State eventually decide to assume the program.

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[74] *See* The 2017 Economic Contributions of Outdoor Recreation in Colorado, Colorado Parks and Wildlife (July 23, 2018), available at: http://cpw.state.co.us/Documents/Trails/SCORP/2017EconomicContributions_SCORP.pdf.

[75] *See* 51 *Fed. Reg*. 41206, 41217 (November 13, 1986); 53 *Fed. Reg.* 20764, 20765 (June 6, 1988) (excluding from CWA jurisdiction, "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased").

[76] Justice Greg Hobbs, Colorado, Mother of Rivers: Water Poems, 2005, Published by the Colorado Foundation for Water Education, ISBN 0-9754075-4-6.

[77] EPA has estimated that a state typically spends about $225,000 to evaluate section 404 program assumption. EPA Wetland Program Development Grants may be available to partially offset this expense. *Subcommittee Hearing* at 7.